UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSÉ MORALES, EFREN MORALES, and FELIX PACHECO, and on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

PLANTWORKS, INC., NEIL MENDELOFF, and VERNA MENDELOFF,

Defendants.

MEMORANDUM DECISION

05 Civ. 2349 (DC)

APPEARANCES:

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CHIN, D.J.

Plaintiffs José Morales, Efren Morales, and Felix Pacheco were employed as landscapers by defendant Plantworks, Inc., which is owned and operated by defendants Neil Mendeloff and Verna Mendeloff. Plaintiffs bring this action pursuant to the Fair Labor Standards Act (the "FLSA"), the New York Labor Law, and the "spread of hours" wage order of the New York Commission of Labor. Plaintiffs contend that defendants maintained a policy and practice of requiring plaintiffs to work more than forty hours per week without paying them minimum wage

and overtime compensation in violation of state and federal labor laws. Plaintiffs also seek to recover damages against defendants for discrimination and retaliation under Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981, the New York State Executive Law § 290 et seq., the FLSA, 29 U.S.C. § 201 et seq., and New York Labor Law § 215.

Plaintiffs move for an order (1) permitting plaintiffs to proceed as a collective action with respect to their FLSA claims; (2) compelling defendants to furnish the names and last known addresses of all employees of Plantworks since September 2002; (3) authorizing plaintiffs to send a notice and "opt-in" form to all prospective members of the collective action; and (4) compelling Plantworks to post the Court-approved "opt-in" notice in conspicuous locations in its offices. The motion is denied in part and granted in part, as set forth below.

DISCUSSION

The FLSA permits employees to maintain an action "for and in behalf of . . . themselves and other employees similarly situated." 29 U.S.C. § 216(b). The named plaintiffs must be "similarly situated" to the proposed members of the class, and proposed class members must "opt in" and consent in writing to being a party to the action. Id.

In collective actions, courts in this circuit frequently follow a two-stage certification process. Masson v. Ecolab, Inc., No. 04 Cv. 4488 (MBM), 2005 WL 2000133, at *13 (S.D.N.Y. Aug. 17, 2005); Gjurovich v. Emmanuel's Marketplace,

Inc., 282 F. Supp. 2d 91, 96 (S.D.N.Y. 2003); Rodolico v. Unisys Corp., 199 F.R.D. 468, 480 (E.D.N.Y. 2001) (class certification in ADEA case); see also Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, 7B Federal Practice and Procedure: Civil 3d § 1807, at 487-53 (2005) (discussing two stages of certification process) ("Wright, Miller & Kane"). At the first stage, the court examines the pleadings and affidavits to determine whether the named plaintiffs and putative class members are similarly situated. Masson, 2005 WL 2000133, at *13. If the court finds that they are, it conditionally certifies the class and permits notice to be sent to putative class members. Id.; Wright, Miller, & Kane, 7B Federal Practice and Procedure § 1807, at 492-93. At the second stage, the employer can move to decertify the class if discovery reveals that the claimants are not similarly situated. Masson, 2005 WL 2000133, at *14.

In collective actions, district courts have "broad discretion to grant certification, to allow discovery, and to regulate notice." Wright, Miller, & Kane, 7B Federal Practice and Procedure § 1807, at 486. See Hoffman v. Sbarro, Inc., 982 F. Supp. 249, 261 (S.D.N.Y. 1997) ("It is well settled that district courts have the discretionary power to authorize the sending of ['opt-in'] notice[s] to potential class members."). Thus, at this early stage in the litigation, the threshold question for the Court is whether circumstances exist to warrant the exercise of this discretion or, in other words, whether plaintiffs have demonstrated that the potential class members are

"similarly situated" to them. Id.

The FLSA does not define "similarly situated" nor does it set out standards for determining whether the requirement has been met. See id. In this Circuit, "courts have held that plaintiffs can meet this burden by making a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law." Hoffman, 982 F. Supp. at 261 (citing cases). See also Jackson v. New York Tel. Co., 163 F.R.D. 429, 431 (S.D.N.Y. 1995) ("[P]laintiffs need merely provide 'some factual basis from which the court can determine if similarly situated potential plaintiffs exist.'") (quoting Schwed v. General Electric Co., 159 F.R.D. 373, 376 (N.D.N.Y. 1995)). The leniency of this requirement is consistent with the broad remedial purpose of the FLSA. See Hoffman, 982 F. Supp. at 262 (citing cases discussing broad remedial purpose of FLSA).

In this case, plaintiffs have not met their burden. In support of their motion, plaintiffs submitted an affidavit of their attorney, to which were attached the following exhibits: (1) plaintiffs' First Amended Complaint; (2) a proposed "opt in" form; (3) a copy of the settlement form and general release issued to plaintiff Pacheco by defendants; (4) copies of four payroll check stubs for plaintiff José Morales; (5) copies of two payroll stubs for plaintiff Efren Morales; and (6) copies of two payroll stubs for plaintiff Felix Pacheco. (Faillace Aff. Ex. A-F). The payroll stubs support plaintiffs' claim that they were

paid the regular rate for overtime. (Faillace Aff. Ex. D-F). The affidavit and exhibits, however, contain no reference to any Plantworks employee other than plaintiffs, and they make no allegations of a common policy or plan to deny plaintiffs overtime. The only additional support for plaintiffs' claim that they are similarly situated to other Plantworks' employees comes from their conclusory allegation in the amended complaint that "[t]here are over 20 current and former employees that are similarly situated to Plaintiffs and have been denied minimum wage and overtime compensation while working for Defendants. Plaintiffs are representative of these other workers and are acting on behalf of their interests as well as their own interests in bringing this action." (Am. Compl. ¶ 33).

Though the first stage of class certification only requires a "modest factual showing," it must be sufficient to demonstrate that plaintiffs and potential class members were victims of a common scheme or plan that violated the law. See Hoffman, 982 F. Supp. at 261; Levinson v. Primedia Inc., 02 Cv. 2222 (CBM), 2003 WL 22533428 (S.D.N.Y. Nov. 6, 2003) (finding that plaintiff failed to meet "modest burden"). In making this showing, "[c]onclusory allegations are not enough." Wright, Miller, & Kane, 7B Federal Practice and Procedure § 1807, at 490-91. Here, plaintiffs have offered only a conclusory allegation in their complaint; they have offered nothing of evidentiary value. Because plaintiffs have failed to meet this minimal requirement, their motion for class certification is denied.

In light of the remedial purpose of the FLSA and the Court's broad discretionary power, plaintiffs' motion for the names and addresses of Plantworks employees is granted, but only to the extent that defendants must produce the names and last known addresses of all individuals employed by Plantworks since 2002 in non-management positions with whom they have not entered settlement agreements. See Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 168-70 (1989) (upholding district judge's order that employer produce names and addresses of discharged employees); Wright, Miller, & Kane, 7B Federal Practice and Procedure § 1807, at 495-96 ("If conditional certification is denied, the court may allow discovery to provide plaintiffs a second opportunity to obtain sufficient evidence of a collective to warrant conditional certification and the notice to opt in.")

CONCLUSION

Based on the record before the Court, plaintiffs' motion for certification and for authorization to send a notice and "opt-in" form is denied. Plaintiffs may renew the motion should discovery reveal additional facts to support the

application. Plaintiffs' motion for the names and addresses is granted to the limited extent set forth above.

SO ORDERED.

Dated: New York, New York
February 1, 2006

DENNY CHIN
United States District Judge